

*United States Court of Appeals
for the Second Circuit*



APPELLEE'S BRIEF

74-1795

*To be argued by
John J. LOFLY*

United States Court of Appeals
For the Second Circuit

B

GEORGE J. SCHONHOLTZ,

*Plaintiff-Appellant,
against*

**AMERICAN STOCK EXCHANGE, INC., RAMSAY, RE,
FARELL, ROCHLIN & ERDMAN and BEAR,
STEARNS & CO.,**

Defendants-Appellees.

PLS

**On Appeal from the United States District Court
for the Southern District of New York**

**BRIEF OF DEFENDANT-APPELLEE
AMERICAN STOCK EXCHANGE, INC.**

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
Docket No. 74-1795

GEORGE J. SCHONHOLTZ,

Plaintiff-Appellant,

-against-

AMERICAN STOCK EXCHANGE, INC.,
RAMSAY, RE, FARRELL, ROCHLIN &
ERDMAN and BEAR, STERNS & CO.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANT-APPELLEE
AMERICAN STOCK EXCHANGE, INC.

PRELIMINARY STATEMENT

This brief is respectfully submitted on behalf of
defendant-appellee American Stock Exchange, Inc. (the "Amex")

in response to the brief submitted by plaintiff-appellant. The plaintiff's appeal is from a decision dated May 6, 1974 of the United States District Court for the Southern District of New York (Hon. Morris E. Lasker, J.), granting the defendants' motions pursuant to Rule 12(b) of the Federal Rules of Civil Procedure to dismiss the complaint for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted.

STATEMENT OF THE CASE

The present action was brought on or about August 24, 1973 by plaintiff seeking damages for himself and all other persons who purchased common stock of Levitz Furniture Corporation ("Levitz") on the Amex between October 20, 1969 and August 24, 1971 in order to cover a short position.

The asserted jurisdictional basis of the suit is §§ 1 through 34 of the Securities Exchange Act of 1934, particularly §§ 6, 10(b), 20 and 27, SEC Rule 10b-5, Rules 170 and 177 of the American Stock Exchange Rules of Board- Conduct of Business, and Article II, Section 2 of the Constitution of the American Stock Exchange.

Plaintiff's substantive allegations against defendant Amex are as follows:

(a) From October 20, 1969 through August 24, 1971, the common stock of Levitz was being traded on the Amex at artificially high prices due to an inadequate floating supply of approximately 1.3 million shares available to the investing public. (Complaint ¶¶4, 6, App., at A6-A7).

(b) Amex shares a responsibility with its registered specialists to maintain a fair, honest and orderly market in listed securities and insure that the public can buy and sell listed securities at prices which are not artificially inflated by an inadequate floating supply. (Complaint A5, App., at A6-A7).

(c) Plaintiff apparently contends that the Amex's failure to suspend trading in Levitz stock when it knew or should have known that the inadequate float of Levitz common stock had artificially inflated its market price, constituted a breach of the Amex's duty to maintain a fair and orderly market in the stock. (Complaint ¶8, App., at A7-A8).

(d) Amex failed to supervise the specialist in Levitz stock when it knew that the specialist was unable to maintain a fair and orderly market, aiding and abetting the wrongful conduct complained of. (Complaint ¶9, App., at A8).

On November 27, 1973 and November 28, 1973, respectively, defendants Bear, Stearns & Co. and Amex moved to dismiss the complaint pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, (App., at A9-A10). The Hon. Morris E. Lasker, J., granted these motions on May 6, 1974, dismissing the complaint as to all defendants on the ground that plaintiff had failed to state a claim. (App., at A17-A24).

SUMMARY OF ARGUMENT

The court below correctly held that the plaintiff has failed to state an actionable violation of Amex Rules 170 and 177. The complaint fails to allege any breach of the specific duties imposed by Rules 170 and 177, and plaintiff's conclusory allegation that the defendants failed to maintain a fair and orderly market in Levitz stock is not actionable.

The court below also correctly held that the plaintiff's allegations are insufficient to state a claim for fraud under §10(b) of the Exchange Act. Even if the plaintiff had sufficiently alleged violations of Amex Rules 170 and 177, these violations are not actionable in the absence of conduct amounting to fraud on the part of defendants.

Plaintiff's claim that the Amex aided and abetted any possible violations of §10(b) of the Exchange Act must also fail because there is no allegation that the Amex rendered any affirmative assistance. For these reasons, the court below correctly dismissed the complaint for failure to state a claim.

POINT I

THE COURT BELOW CORRECTLY HELD THAT THE COMPLAINT FAILED TO ALLEGE ANY ACTIONABLE VIOLATION OF THE EXCHANGE ACT OR AMEX RULES 170 AND 177.

In his opinion below, Judge Lasker correctly found that "[t]here exists no legal duty or rule of the Amex requiring disclosure of the fact that only 1.3 million shares of Levitz were available for public trading or indicating that such a lot is per se inadequate to assure an orderly market as contemplated by Rule 170." (App., at A-20).

A. The complaint fails to state an actionable violation of Amex Rules 170 or 177.

Plaintiff contends in his brief that it was the Amex's duty to suspend trading in Levitz stock or at least inform the public that an orderly market could not be maintained in that stock. (Appellant's brief, at 37-38). Plaintiff would impose these duties on the Amex by virtue of the fact that, as alleged in paragraph four of the complaint, "there was available to the investing public for trading approximately 1.3 million shares [of Levitz stock]",

and his conclusion that this constituted a failure to maintain a "fair and orderly market" in Levitz stock in violation of Amex Rules 170 and 177. (App., at A-6).*

Amex Rules 170 and 177 impose a number of very specific duties upon specialists with regard to the securities in which they deal. (Rules 170 and 177 are annexed as Exhibits A and B). Although Amex Rule 170(b) requires a registered specialist "to assist in the maintenance, insofar as reasonably practicable, of a fair and orderly market," this general duty is explicitly defined by "the criteria set forth in paragraphs (c) and (d) of this rule and the commentary thereto." Paragraphs (c) and (d) of Rule 170, and the commentary thereto, establish explicit duties owed by a specialist, such as the duty not to effect for his own account "purchases or sales of any security in which such specialist is registered" unless reasonably necessary to maintain a fair and orderly market or to act as an odd-lot dealer. (Rule 170(c)). Rule 177 provides

* In his brief and a supporting affidavit submitted in opposition to the defendants' motions below, plaintiff has attempted to make his claims seem more compelling by referring to investigations of a "corner" in Levitz stock by the SEC and the Attorney General of New York, and implying that the defendants were somehow involved in a massive scheme to defraud short-sellers of Levitz stock. (See page 2 of Appellant's brief; Affidavit of Sidney B. Silverman, App., at A11-A14). Despite these innuendos of fraud plaintiff has cited no action instituted by the SEC, the State of New York, or any private investor with regard to an alleged "corner" in Levitz stock.

that a specialist shall report to an Amex floor officer any unusual activity or price change in a security, or material information regarding the issue or the market in it.

As the court below correctly found, "the complaint alleges no violations of any of these specific duties" imposed on specialists by Rules 170 and 177. (App., at A-2). Moreover, neither of these Rules requires public notice as to the number of shares available for trading in a particular security, or suspension of trading in a security. Article II, Section 2 of the Amex Constitution (annexed as Exhibit C), which the plaintiff also cites in his complaint (#1, App. at A-3), does authorize the Amex Board of Governors to "establish standards and requirements with respect to the listing ... of securities ... and with respect to the continued listing ... [of securities] or the suspension of trading therein or removal of the same from listing," but it does not by its terms require public announcements as to the daily stock "float" or establish any criteria for suspension or delisting.

Although plaintiff has failed to supply any precedent or compelling reason to support his contention that a

private right of action should exist for violations of Amex Rules 170 and 177, he has not alleged a single violation of either of these provisions. In concluding that the alleged float of 1.3 million shares in Levitz common stock constituted a failure to maintain "a fair and orderly market" in that security, plaintiff has overlooked the fact that, pursuant to Article II, Section 2 of its Constitution, the Amex has adopted formal Delisting Policies by which "the Exchange will consider the suspension of trading in, or removal from listing ... of, any security when, in the opinion of the Exchange *** it appears that the extent of public distribution ... of the security has become so reduced as to make further dealings therein on the Exchange inadvisable"*(The Amex Delisting Policies in effect during the relevant period, as published in the Amex

* In a footnote at page 35 of his brief, plaintiff concludes without elaboration that the Amex's "delisting requirements are inapplicable to the present case which involved a situation in which there was adequate public ownership of securities but inadequate supply to meet buying demand." Despite the fact that the Amex has established listing standards which must be approved by the SEC under §6(d) of the Exchange Act as "just and adequate to insure fair dealing and to protect investors" (See page 11, infra), the plaintiff seems to suggest that the Exchange must also monitor the supply and demand situations particular to each of the hundreds of securities listed on the Exchange. As discussed more fully under Point IV, infra, no private right of action exists for a stock exchange's failure to maintain a market immune to ordinary price fluctuations in response to public demand.

Constitution and Rules, are annexed as Exhibit D). Under the Delisting Policies in effect during the period covered by the complaint, in the case of common stock, "the Exchange will normally give consideration to suspending dealings in, or removing from the list, a security when *** the number of shares publicly held (exclusive of holdings of officers, directors, controlling shareholders or other family or concentrated holders) is less than 150,000"*

In order to be registered as a national securities exchange under the Securities Exchange Act of 1934, the Amex was required pursuant to SS 6(a)(3) and 6(a)(4) of the 1934 Act to furnish to the SEC "copies of its constitution, articles or incorporation ..., and of its existing bylaws or rules or instruments corresponding thereto," as well as "any amendments to the rules of the exchange forthwith upon their

* The Amex Delisting Policies were amended in April, 1972 to provide that consideration of suspension or delisting will be made when the number of shares publicly held is less than 200,000.

As held by the court below and discussed more fully infra at pages 19-23, the courts have recognized that a private right of action exists for violations of stock exchange rules only "where coupled with sufficient allegations of fraud on the investor." (App., at A-6). Even under the most generous reading of the facts alleged in the complaint, it is impossible to characterize as fraud the Amex's failure to suspend trading in Levitz when the size of the float as alleged by the plaintiff - 1.3 million shares - was so far above the 150,000 share level specified in the Amex Delisting Policies.

adoption." In order to grant or continue in force the registration of a national securities exchange, the SEC is required by § 6(d) of the 1934 Act to determine that "the rules of the exchange are just and adequate to insure fair dealing and to protect investors" As Judge Gagliardi recently stated in an opinion dismissing a complaint against the New York Stock Exchange which alleged a failure to enforce compliance by a member firm with an exchange adopted rule:

"By granting the Exchange's registration and keeping that registration in force, pursuant to Section 6(d) of the 1934 Act, the Securities and Exchange Commission has found the rules of the Exchange adequate. While Section 6 provides a private right of action against the Exchange for failure of enforcement of existing rules, it does not provide such an action for a failure to enact adequate rules."

Marbury Management, Inc. v. Alfred Kohn, Wood, Walker & Co., ['73 - '74 Transfer Binder] CCH Fed. Sec. L. Rep. ¶94,376, at 95,300 (S.D.N.Y. 1974).
(Emphasis in original).

The plaintiff's claims against the Amex are totally inconsistent with the fact that the SEC has approved the Amex Delisting Policies which provide for delisting or suspension of trading generally only when the float in a security falls

below 200,000 shares. Rather than allege any facts which constitute a violation of the Exchange Act or the Amex's Constitution and Rules, the complaint in this action merely states the plaintiff's dissatisfaction with existing Amex rules which do not require the exchange to suspend trading in a security or disclose the size of the float when no more than 1.3 million shares are publicly available. As Judge Gagliardi stated in the Marbury Management case, supra, the plaintiff's remedy here is not a private right of action for damages against the Amex, but to petition the SEC to require the Exchange to alter or supplement the rules he believes to be inadequate:

"The remedy for such a claimed inadequacy in the Exchange's rules lies in Section 19(b) of the Securities Exchange Act of 1934 (15 USC §78s(b), which authorizes the SEC to alter or supplement the rules of the Exchange." ['73 - '74 Transfer Binder] CCH Fed. Sec. L. Rep. ¶94,376, at 95,300.

B. Plaintiff's allegation that defendants "failed to maintain a fair and orderly market" in Levitz stock is not actionable.

To overcome his inability to allege any violations of explicit duties imposed by the Amex's Constitution and Rules, the plaintiff has attempted to invent a cause of action by invoking the statutory watchword "failure to maintain a fair and orderly market". We have found no precedent for the contention that a private right of action exists for the plaintiff's vague and conclusory claim that defendant Amex failed to insure the maintenance of a fair and orderly market in Levitz stock. Indeed, recognition of a private right of action for the Amex rule violations alleged in this complaint would open the federal courts to any disappointed short-seller who bet on a drop in the market value of a stock and lost.

Although this Court in Colonial Realty Corp. v. Bache & Co., 358 F.2d 178 (2d Cir. 1966), cert. denied, 385 U.S. 817 (1966), did recognize in dicta that a private right of action might exist for a violation of some stock exchange rules, Judge Friendly took care to point out that "Congress did not intend violations of all rules adopted

[by exchanges] under §6(b) [of the Securities Exchange Act] to give rise to civil claims under Federal law...." 358 F.2d at 181.

The reasoning of this Court in sustaining the defendant's 12(b)(6) motion to dismiss the complaint in Colonial Realty is directly in point. The plaintiff in Colonial Realty was a customer holding a margin account with a New York Stock Exchange ("NYSE") member firm which had sold at a loss certain stocks from the margin account despite the fact that the margin was above the minimum percentage required by NYSE rules. In its complaint the plaintiff charged the defendant member firm with a violation of NYSE rules requiring members to conduct business in a manner "consistent with just and equitable principles of trade." The Court first noted that the plaintiff carries a heavy burden of persuasion in urging the actionability of a particular exchange rule violation:

"...[T]he court must look to the nature of the particular rule and its place in the regulatory scheme, with the party urging the implication of a Federal liability carrying a considerably heavier burden of persuasion than when the violation is of the statute or an SEC regulation. The case for implication would be strongest when the

rule imposes an explicit duty unknown to the common law." 358 F.2d at 182 (emphasis added).

This court found that the plaintiff in Colonial Realty had not met this burden, since the rules upon which its action were based were general provisions creating no new or specific duties and would flood the federal courts with "garden-variety" suits:

"Although [the rules here at issue] do impose a duty upon members not to engage in conduct inconsistent with fair and equitable principles of trade, which the exchange...can enforce through disciplinary proceedings, they are something of a catch-all which, in addition to satisfying the letter of the statute, presumes power to discipline members for a wide variety of misconduct, including merely unethical behavior which Congress could well not have intended to give rise to a legal claim. We find little reason to believe that by requiring exchanges...to include such provisions in their rules, Congress meant to impose a new legal standard on members different from that long recognized by state law.

* * *

"...[M]ere recitation of the statutory watchword ['inconsistent with just and equitable principles of trade'] by an aggrieved investor would saddle, the Federal courts with garden-variety customer broker suits...." 358 F.2d at 182-83.

Because he has merely alleged a violation of a "catch-all" provision of the Amex rules, plaintiff in the instant action has failed to meet the burden necessary to establish a private right action. Unable to allege a violation of any of the explicit duties imposed upon specialists by Amex Rules 170 and 177 (although no precedent supports the actionability of a violation of even these duties), plaintiff has attempted to characterize the Amex's failure to suspend trading in Levitz stock as a failure to maintain a fair and orderly market, despite the fact that the floating supply of Levitz stock alleged in the complaint was well above the minimum figure of 150,000 publicly held shares specified by Amex delisting guidelines. See pages 9 - 10, supra. Clearly the plaintiff could have characterized almost anything as a failure to maintain a fair and orderly market. To permit a private right of action for merely alleging this regulatory watchword would flood the federal courts with suits by disappointed short-sellers seeking to recoup their losses from improvident speculation.

POINT II

THE COURT BELOW CORRECTLY HELD THAT THE PLAINTIFF'S ALLEGATIONS ARE INSUFFICIENT TO STATE A CLAIM FOR FRAUD UNDER §10(b) OF THE EXCHANGE ACT, AND THAT IN THE ABSENCE OF FRAUD VIOLATIONS OF EX-CHANGE RULES ARE NOT ACTION-ABLE.

- A. Plaintiff's conclusory allegations of fraud are insufficient to state a claim under §10(b) of the Exchange Act.

As interpreted by the court below, as well as by the plaintiff (see Appellant's brief, at 26), the plaintiff's claims against the defendants for violations of §10(b) of the Exchange Act are as follows:

"Plaintiff's claim boils down to the assertion that defendants impliedly represented to the public that there was an adequate floating supply of Levitz stock; that plaintiff relied on this representation; that the floating supply was actually "inadequate" (Paragraph 8); that price movements in the stock were accentuated as a consequence; and that defendants were under a duty to disclose these facts and halt trading in the stock (Paragraph 8)." (App., at A19-A20).

We submit that the court below correctly held that the complaint did not meet the requirement of Rule 9(b)

of the Federal Rules of Civil Procedure and the decisions of this Court that "the circumstances constituting a §10(b) claim be stated with particularity and that merely conclusory allegations of fraud are insufficient to state a §10(b) claim." (App., at 2).

It is settled beyond question that FRCP 9(b), which requires that "in all averments of fraud...the circumstances constituting fraud...shall be stated with particularity," applies to actions brought under §10(b) of the 1934 Act, and Rule 10b-5 thereunder. Shemtob v. Shearson, Hammill & Co., 448 F.2d 442 (2d Cir. 1971); Segal v. Gordon, 467 F.2d 602 (2d Cir. 1972). Moreover, it is equally well-settled that "merely conclusory allegations to the effect that defendants conduct was fraudulent or in violation of Rule 10b-5 are insufficient to state a claim under Rule 10b-5. Shemtob v. Shearson, Hammill & Co., supra, 448 F.2d 442.

As the court below observed (see App., at A20-A21), the plaintiff's own allegations establish that the Amex complied with its delisting policies providing for delisting of a security where "the number of shares publicly held (exclusive of holdings of officers, directors, controlling shareholders or other family or concentrated holdings) is less than 150,000." See pages 9 - 10, supra. Plaintiff's conclusion that the Amex owed a duty to disclose that "only"

1.3 million shares of Levitz was available for public trading, or to suspend trading in Levitz, is completely unsupported in law and patently insufficient to state a claim under §10(b) of the Exchange Act.

- B. Even if plaintiff had sufficiently alleged violations of Amex rules, such violations are not actionable in the absence of fraud.
-

As discussed under Point I, supra, the plaintiff has failed to allege sufficiently any violations of Amex Rules 170 and 177. It should be pointed out, however, that even if plaintiff had sufficiently alleged violations of Amex rules, these violations would not be actionable in the absence of conduct amounting to fraud. As correctly held by the court below, "allegations of [exchange rule] violations have been held to state a claim only where coupled with sufficient allegations of fraud on the investor." (App., at A-23).*

* Plaintiff's discussion (Appellant's brief, at 13-15) of cases suggesting that negligence suffices to state a cause of action against a securities exchange under §6 of the Exchange Act, misses the point of the holding below. Assuming, arguendo, that an exchange may be held liable for negligence in failing to discover or take disciplinary action for violations by its members of exchange rules, the underlying exchange rule violations must still be coupled with fraud in order to render them actionable. The exchange rule violation in Baird v. Franklin, 141 F.2d 238 (2d Cir. 1944), cert. denied, 323 U.S. 737 (1944), discussed at pages 13-15 of plaintiff's brief, was an N.Y S.E. member's illegal conversion of his customer's securities, an exchange rule violation which unquestionably involved fraud on the part of the member.

It is generally accepted that no violation of any exchange adopted rule is per se actionable, and that a private right of action will not be recognized in the absence of allegations of conduct amounting to fraud. Holding in Buttrey v. Merrill Lynch, Pierce, Fenner & Smith, 410 F.2d 135 (7th Cir. 1969), cert. denied, 396 U.S. 838 (1969), that a violation by a member firm of N.Y.S.E. Rule 405, the so-called "know your customer" rule, was actionable, the Seventh Circuit explicitly refused to "decide that an alleged violation of Rule 405 is per se actionable." 410 F.2d at 142. The Buttrey decision indicates that whether a private right of action exists for a particular exchange rule violation will be determined by whether conduct amounting to fraud was alleged in the complaint:

"Although mere errors of judgment by defendant might not support a federal cause of action, the facts alleged here are tantamount to fraud on the bankrupt's customers, thus giving rise to a private civil damage action." 410 F.2d at 143.

Citing this statement by the Buttrey court in sustaining a defendant N.Y.S.E. member firm's 12(b)(6) motion to dismiss, the court in Aetna Casualty & Surety Co. v. Paine, Webber, Jackson & Curtis ['69 - '70 Transfer Binder] CCH Fed.

Sec. L. Rep. ¶92,748 (N.D. Ill. 1970), held that an alleged violation of Rule 405 which amounted to "mere negligence" was not actionable:

"Having considered the facts of the instant case in relation to the facts and reasoning of Buttrey, we do not find that the allegations of the complaint in this case present an adequate foundation for a finding of a federal right of action."
['69 - '70 Transfer Binder] CCH Fed. Sec. L. Rep. ¶92,748 at 99,274.

More recently, the district court in McMaster Hutchinson & Co. v. Rothschild & Co., ['72 - '73 Transfer Binder] CCH Fed. Sec. L. Rep. ¶93,541 (N.D. Ill. 1972), citing the Buttrey and Aetna decisions, has sustained a defendant's 12(b)(1) motion to dismiss a private action for violations of NYSE Rule 405 and related "know your customer" rules. Noting that "no case has been cited for the proposition that a violation of stock exchange rules per se set forth a federally protected private right of action," ['72 - '73 Transfer Binder] CCH Fed. Sec. L. Rep. ¶93,541, at 92,585, the court distinguished the Buttrey holding on the ground that there were "no allegations of fraud in the instant suit." Id., at 92,585 n. 1.

In only one case in the Southern District has the court overruled a defendant's 12(b)(6) motion to dismiss a complaint alleging violations of stock exchange rules. In that case, Bush v. Bruns Nordeman & Co., ['72 - '73 Transfer Binder] CCH Fed. Sec. L. Rep. ¶93,674 (S.D.N.Y. 1972), the plaintiff alleged a violation of SEC Rule 10b-5 as well as NYSE Rule 405 and the court explicitly noted that "the alleged anti-fraud violations...are inextricably linked with [the Rule 405] cause of action." ['72 - '73 Transfer Binder] CCH Fed. Sec. L. Rep. ¶93,674, at 93,008.

The McMaster court noted in its opinion that "there are...strong policy reasons for finding that rules of stock exchanges do not set forth federally protected rights," and quoted Judge Friendly's admonition in Colonial Realty, supra, to avoid "[saddling] the federal courts with garden-variety customer-broker suits..." ['72 - '73 Transfer Binder] CCH Fed. Sec. L. Rep. ¶93,541, at 92,586, quoting 358 F.2d at 183. Plaintiff simply gambled and lost. His assertion that the market was not orderly, merely because the price of Levitz stock increased, represents nothing more than his contention based on hindsight and his initial investment error that there should have been more Levitz shares for sale in

August 1971 so that the price would have been static or declined. There is no legal basis for this claim.

POINT III

PLAINTIFF'S CLAIM THAT THE AMEX AIDED AND ABETTED VIOLATIONS OF §10(b) OF THE EXCHANGE ACT IS INSUFFICIENT IN THE ABSENCE OF ALLEGATIONS THAT THE EXCHANGE RENDERED AFFIRMATIVE ASSISTANCE TO THE ALLEGED VIOLATIONS.

A point not ruled upon by the court below is the plaintiff's assertion, restated at page 36 of his brief, that "by its failure to enforce its rules and discipline Ramsey, Re for its prolonged misfeasance to reveal the consequences thereof, the defendant Amex aided and abetted Ramsey, Re in its misrepresentation and course of deceitful conduct." (Emphasis added). The court below did not reach this point because it found that plaintiff had failed to state a §10(b) claim against any of the defendants. (App., at A-2).

However, even if plaintiff had sufficiently stated a §10(b) claim against Ramsey, Re, his claim that the Amex aided and abetted this violation is fatally defective because the complaint fails to allege that the Amex rendered any affirmative assistance to alleged violations of the securities laws or that the Amex benefited from any such

violations.

As the plaintiff himself concedes, his claim that the Amex aided and abetted a §10(b) violation by its member firm is based on the allegation that the Exchange "failed to take affirmative action." (Appellant's brief, at 37). Section 876 of the Restatement of Torts (1939) requires that a secondary defendant "give substantial assistance or encouragement" to the primary wrongdoer in order to be subject to liability as an aider and abettor. The majority of courts follow this rule in refusing to impose aiding and abetting liability for mere inaction. See, e.g., Fischer v. Kletz, 266 F.Supp. 180, 197 (S.D.N.Y. 1967); Ruder, "Multiple Defendants in Securities Law Fraud Cases: Aiding and Abetting, Conspiracy, in Pari Delicto, Indemnification and Contribution," 120 U. of Pa. L. Rev. 597, 644 (1972).

A few courts have imposed aiding and abetting liability in certain situations for "mere inaction" or "acquiescence through silence." See, e.g., Brennan v. Midwestern Life Ins. Co., 286 F. 702, (N.D. Ind. 1968), aff'd 417 F.2d 147 (7th Cir. 1969). However, the holdings by most of these courts agree with the statement by a leading commentator that "benefit...should be essential when the

allegation is aiding-abetting by silence and inaction rather than by affirmative conduct" and that such a benefit must be more than a fee received in the ordinary course of business.

2 A. Bromberg, Securities Law: Fraud, §8.5 (584), at 208, 48 (1971). As noted by both courts in the Brennan case, supra, the issuer in that case, who aided and abetted the §10(b) violations of the broker dealing in its shares, received a benefit from the demand for its shares created by the broker's fraudulent sales activity. 286 F.Supp., at 715-16, 417 F.2d, at 151-54.

Plaintiff's claim that the Amex aided and abetted any alleged violations of the securities laws must fail in the absence of allegations that Amex either rendered affirmative assistance to alleged violations of the securities laws, or received a benefit from such violations.

POINT IV

NO PRIVATE RIGHT OF ACTION EXISTS
FOR FAILURE TO MAINTAIN A MARKET
IMMUNE TO PRICE FLUCTUATIONS IN
RESPONSE TO PUBLIC DEMAND

The gravamen of and the central defect in plaintiff's theory of this case are found in paragraph 5 of the complaint which reads, in part, as follows:

"In AMEX listed securities, the responsibility for maintaining an orderly market is shared by the AMEX and the specialist which the AMEX assigns to make a market in the securities. The AMEX and the specialist have the responsibility to insure that members of the public can buy and sell securities at prices which are free from artificially inflated prices caused by a floating supply which is inadequate to meet the public demand."

App., at A6-A7.

It is hardly novel to note that a stock exchange is similar to a public auction; when the number of bidders for a given stock increases, the price will go up. It is not the function of a specialist or of the exchange to block price fluctuations. Plaintiff sold Levitz short on August 4 and 11, 1971 and covered on August 17, 1971. Plaintiff does not reveal the difference in price during this period or state his own "damages." There is no legal basis for a

claim that there should always be sufficient stock for sale to prevent loss to those who sell short. Short sellers are speculators. They gamble on a stock price decline. As one court has observed, "A margin account and a short sale are speculative to the extent that they can be termed 'rank gambles.'" Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bolock, 247 F.Supp. 373, 379 (S.D. Tex. 1965). Short selling is a high risk operation at best and the time to investigate the "float" and potential demand for the stock is before going short, not after.

The Court does not need expert testimony to conclude that the demand for a given stock is subject to influence by many factors -- some intrinsic to the company, such as favorable earnings reports or introduction of new products, and others extrinsic, based, for example, on general economic conditions or shifts in national policy. Plaintiff claims in effect he should be insured against a price rise in stocks he selects to sell short. A stock exchange cannot provide such protection and all reasonably well informed investors know it. As this court has frequently stated, the aim of §10(b) and Rule 10b-5 is "not to establish a scheme of investors' insurance." Shapiro v. Merrill Lynch, Pierce,

Fenner & Smith, ['73 - '74 Transfer Binder] CCH Fed. Sec. L. Rep. ¶94,473, at 95,663 (2d Cir. 1974), quoting, List v. Fashion Park, 340 F.2d 457, 463 (2d Cir. 1965).

Plaintiff chose to engage in one of the riskier forms of market speculation. His judgment that Levitz stock would quickly fall was wrong. The Amex does not and should not give market advice, but plaintiff now claims the Exchange should have protected him from his loss. There was no basis for a suspension of trading under the Rules of the Exchange. (See pages 9-10, supra). To suspend under such circumstances might well expose the Exchange to suits from stockholders damaged by the suspension. The plaintiff simply misjudged the market. There is no legal device under which the results of this mistake can be held to be the responsibility of the Exchange.

CONCLUSION

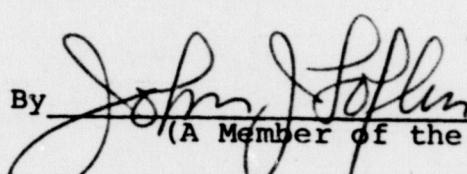
For the foregoing reasons, it is respectfully submitted that the decision of the court below dismissing the complaint should be affirmed.

Dated: September 11, 1974

Respectfully submitted,

LORD, DAY & LORD

By


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Exhibit A
American Stock Exchange
Rule 170
2 CCH American Stock
Exchange Guide ¶9310

Registration and Functions of Specialists

Rule 170. (a) No member shall act as a specialist in any security unless such member is registered as a specialist in such security by the Exchange and such registration may be revoked or suspended at any time by the Exchange.

(b) As a condition of a member's being registered as a specialist in one or more securities, it is to be understood that, in addition to the execution of commission orders entrusted to him and the performance of his obligations as an odd-lot dealer (if he is so registered) in such securities, a specialist is to engage in a course of dealings for his own account to assist in the maintenance, insofar as reasonably practicable, of a fair and orderly market on the Exchange in such securities in accordance with and when viewed in relation to the criteria set forth in paragraphs (c) and (d) of this rule and the commentary thereto. If the Exchange shall have found any substantial or continued failure by a specialist to engage in such a course of dealings, the registration of such specialist shall be subject to suspension or cancellation by the Exchange in one or more of the securities in which he is registered. Nothing herein shall limit any other power of the Board of Governors under the Constitution or any rule of the Exchange with respect to the registration of a specialist or in respect of any violation by a specialist of the provisions of this rule.

(c) A specialist or his member organization shall not effect on the Exchange purchases or sales of any security in which such specialist is registered, for any account in which he or his member organization is directly or indirectly interested, unless such dealings are reasonably necessary to permit such specialist to maintain a fair and orderly market, or to act as an odd-lot dealer in such security.

(d) In connection with the function of a specialist in relation to assisting in the maintenance, insofar as reasonably practicable, of a fair and orderly market in the securities in which he is registered, it is ordinarily expected that a specialist will engage, to a reasonable degree under the existing circumstances, in dealings for his own account in full lots when lack of price continuity or lack of depth in the full lot market or temporary disparity between supply and demand in either the full lot or the odd-lot market exists or is reasonably to be anticipated. Transactions on the Exchange for his own account effected by a specialist in the securities in which he is registered are to constitute a course of dealings reasonably calculated to contribute to the maintenance of price continuity with reasonable depth, and to the minimizing of the effects of temporary disparity between supply and demand, immediate or reasonably to be anticipated, in either the full lot or the odd-lot market. Transactions in such securities not part of such a course of dealings are not to be effected by a specialist for his own account.

(e) No member (other than a specialist acting pursuant to paragraphs (c) or (d) above), limited partner, officer, employee, approved person or party approved pursuant to Article IV, Section 2(g) of the Constitution, who is affiliated with a specialist or specialist member organization, shall, during the period of such affiliation, purchase or sell any security in which such specialist is registered for any account in which such person or party has a direct or indirect interest. Any such person or party may, however, reduce or liqui-

date an existing position in a security in which such specialist is registered provided that such orders are (1) identified as being for an account in which such person or party has a direct or indirect interest; (2) approved for execution by a Senior Floor Official; and (3) executed by the specialist in a manner reasonably calculated to contribute to the maintenance of price continuity with reasonable depth. No order entered pursuant to this paragraph (e) shall be given priority over, or parity with, any order represented in the market at the same price.

• • • *Commentary* —

.01 In effecting transactions for his own account for the purpose of establishing or increasing a position, a specialist is to effect such transactions in a reasonable and orderly manner in relation to the condition of the general market, the market in the particular stock and the adequacy of his position to the immediate and reasonably anticipated needs of the full lot and the odd-lot market. The following types of transactions to establish or increase a position are not to be effected except when they are reasonably necessary to render the specialist's position adequate to such needs:

- (a) a purchase at a price above the last sale in the same trading session;
- (b) the purchase of all or substantially all the stock offered on the book at a price equal to the last sale, when the stock so offered represents all or substantially all the stock offered in the market; and, when a substantial amount of a stock is offered at a price equal to the last sale price, the purchase of more than 50% of all the stock offered at the last sale price;
- (c) the supplying of all or substantially all the stock bid for on the book at a price equal to the last sale, when the stock so bid for represents all or substantially all the stock bid for in the market; and, when a substantial amount of a stock is bid for at a price equal to the last sale price, the supplying of more than 50% of all the stock bid for at the last sale price;
- (d) failing to re-offer or re-bid where necessary after effecting transactions described in (a), (b) or (c) above.

Transactions of these types may, nevertheless, be effected with the approval of a Floor Official or in relatively inactive markets where they are an essential part of a proper course of dealings and where the amount of stock involved and the price change, if any, are normal in relation to the market.

.02 Transactions by a specialist for his own account in liquidating or decreasing his position in a stock in which he is registered are to be effected in a reasonable and orderly manner in relation to

• • • *Commentary*

the condition of the general market, the market in the particular stock and the adequacy of the specialist's positions to the immediate and reasonably anticipated needs of the full lot and the odd-lot market, and, in this connection, unless he has the prior approval of a Floor Official, he should avoid:

- (a) liquidation of all or substantially all of a position by selling stock at prices below the last different price or by purchasing stock at prices above the last different price unless such transactions are reasonably necessary in relation to the specialist's overall position in the stocks in which he is registered;
- (b) failing to maintain a fair and orderly market during liquidations;
- (c) failing to re-enter the market where necessary, after effecting transactions described in (a) above.

.03 A specialist's quotation, made for his own account, should be such that a transaction effected at his quoted price or within the quoted spread, whether having the effect of reducing or increasing the specialist's position, would bear a proper relation to preceding transactions and anticipated succeeding transactions.

.04 A specialist should avoid participating as a dealer in opening or reopening a stock in such a manner as to reverse the balance of public supply and demand as reflected by market and limited price orders at or near the price of the previous close or halt, unless the condition of the general market or the specialist's position in light of the reasonably anticipated needs of the market makes it advisable to do so, or unless the specialist has obtained the prior approval of a Floor Official to do so. He may, however, buy or sell stock as a dealer to minimize the disparity between supply and demand at an opening or reopening.

.05 A member acting as a specialist may not effect transactions for the purpose of adjusting a LIFO inventory in a stock in which he is so acting except as a part of a course of dealings reasonably necessary to assist in the maintenance of a fair and orderly market.

.06 Members dealing for their own account are subject to the short selling rules of the Securities and Exchange Commission, and the above criteria with respect to the function of a specialist in relation to assisting in the maintenance, insofar as reasonably practicable, of a fair and orderly market in the securities in which he is registered do not require or permit any transactions in contravention of the short selling rules of the Commission.

.07 Under certain circumstances a specialist may assign securities in which he is registered to an investment account. Purchases creating or adding to a position in an investment account may not be made unless reasonably necessary to permit the specialist to assist in the maintenance of a fair and orderly market or to act as an odd-lot dealer.

• • • **Commentary**

In the maintenance of price continuity with reasonable depth, it is commonly desirable for a specialist to supply securities to the market, even though he may have to sell short to do so, to the extent reasonably necessary to meet the needs of the market.

A specialist may not effect a transfer of securities in which he is registered from his dealer account to an investment account if the transfer would result in creating a short position in the dealer account.

A specialist may not assign to an investment account any securities in which he is registered which were purchased in the full-lot market on a "plus" or "zero plus" tick. In addition, in order to make such assignment, he must have maintained, with respect to full-lot purchases in that security, a stabilization rate of at least 75%, measured by the tick test, as defined in Rule 111(e)(3), for the day of purchase, and for the entire calendar week encompassing that day.

If a "net long" position is created as a result of a specialist's maintenance of an investment position in a security in which he is registered while a short position in such security exists in his dealer account, the specialist may not cover such a short position by purchasing in the full-lot market on a "plus" tick. In addition, he must also limit his purchase to no more than 50% of the security offered on a "zero plus" tick, and in no event may he purchase the final full-lot offered.

Each specialist who establishes or maintains an investment account in any security in which he is registered as a specialist shall file with the Exchange in form prescribed by the Exchange a monthly report showing his position in such account and his short position, if any, in his dealer account for each such security.

Exhibit B
American Stock Exchange
Rule 177
2 CCH American Stock
Exchange Guide ¶9317

Duty to Report

Rule 177. Every specialist shall report to a Floor Official:

Unusual activity

(a) Any unusual activity or price change in a security in which he specializes;

Material information

(b) Any information which he receives which he believes may affect materially the business or financial structure of the issuer of, or the market in, a security in which he specializes;

Options

(c) Any information with respect to the existence of options or selling agreements with respect to the security in which he specializes; and

Unusual transactions

(d) Any unusual transaction or transactions in which he participates as a broker or as a dealer in the security in which he specializes.

Exhibit C
American Stock Exchange
Constitution
Article II, Section 2
2 CCH American Stock
Exchange Guide ¶9012

Powers, Duties and Procedures

Powers and duties

SEC. 2. The Board of Governors shall be vested with all powers necessary for the government of the Exchange, the regulation of the business conduct of members, member firms and member corporations of the Exchange and of approved persons in connection with their conduct of the business of member corporations.

Rules

In the exercise of its powers, the Board may adopt, modify or rescind such rules, require such appearances and the filing of such reports, issue such orders and directions, and make such decisions as it may deem appropriate, which rules, requirements, orders, directions and decisions shall be binding upon members, member firms, member corporations and approved persons concerned.

Procedure

The Board shall determine the manner and form by which its proceedings shall be conducted; shall make such appointments and perform such other duties as are required herein; shall remove any officer or dissolve any committee, except the Nominating Committee, when in its opinion the public interest or the welfare of the Exchange so requires; and shall have original and supervisory jurisdiction over any and all subjects and matters referred to committees or officers, and may direct and control their actions or proceedings at any stage thereof.

Finances

The Board shall have control of the property and finances of the Exchange. No purchase of real property shall be made by the Exchange, nor shall it sell, mortgage or lease its real property, unless authorized by the affirmative vote of a majority of the entire Board. By the affirmative vote of a majority of the entire Board, it shall fix the amount of fees and compensation, if any, to be paid to governors, to members of committees, to Arbitrators, to Trustees of the Gratuity Fund and to members and other persons called to give information before the Board or any committee.

Delegation of powers

The Board of Governors by the affirmative vote of a majority of the entire Board, may delegate such of its powers as it may from time to time determine, subject to the provisions of the Constitution and applicable law, to such committee or committees composed of Governors, as the Board may from time to time authorize. The Board may assign such authority and duties to the Chairman and to other officers and employees of the Exchange in addition to those specified in the Constitution, as the Board may from time to time determine, subject to applicable law.

The Board of Governors may also appoint such other committees, composed either of governors or other persons, with such powers other than those vested in the Board under the Constitution or applicable law, and for such terms as it may from time to time determine. Subject to the approval of the Board, and after seeking the advice of all segments of the membership, the Chairman shall from time to time appoint a number of regular, associate and allied members of the Exchange, who shall be designated as Exchange Officials, to serve on such committees. In selecting such Exchange Officials, the Chairman shall give due consideration to the various phases of Exchange activities and member organization operations.

Appeal

An appeal to the Board from a decision of any committee other than the Executive Committee, or from a decision of any officer or employee acting under authority granted by the Board may be taken by a member, member organization or approved person affected by such decision, by filing with the Secretary of the Exchange a written demand therefor within five business days after the decision has been rendered. A member of any such committee taking part in the hearing of a matter may, within two days after a decision has been made thereon, appeal therefrom to the Board by filing a written demand therefor with the Secretary of the Exchange. Any member or ex-officio member or additional member of any such committee from whose decision an appeal to the Board is taken pursuant hereto may participate in the hearing of such appeal, but shall not participate in the deliberation or determination of the Board thereon. The decision of the Board with respect to any such appeal shall be final and conclusive, except that the Board under its general power of delegation may authorize the Executive Committee to consider any specific appeal or any class or type of appeals and in such case the decision of the Executive Committee with respect thereto shall be final and conclusive.

Delegation in emergency

Whenever it shall appear to the Board that an emergency exists, other than as provided for in Article XII, it may by resolution adopted by the affirmative vote of a majority of the entire Board delegate all of its powers which may lawfully be delegated, for such period as it may determine, to a Special Committee, to be composed of three or more governors, at least half of whom shall be regular, associate or allied members of the Exchange. The Board by such resolution may designate one or more governors who are regular, associate or allied members of the Exchange as alternates for the members of such committee who are regular, associate or allied members of the Exchange and one or more other governors as alternates for the members of such committee who are not regular, associate or allied members of the Exchange. Governors so designated may replace any absent member or members for whom they are alternates at any meeting of such committee.

Meetings

An annual meeting of the Board of Governors shall be held immediately following the close of business on the Exchange on the first Thursday after the annual election of the Exchange in each year or, if the Exchange is not open for business on that day, on the next succeeding business day, and no notice of such meeting need be given.

Regular meetings of the Board shall be held at such times as the Board may designate by resolution, and no notice of such meetings need be given.

Special meetings of the Board may be called by the Chairman of the Board, or pursuant to the written request of four governors, upon notice as below prescribed, but no notice need be given to any governor who has submitted a signed waiver thereof.

All meetings of the Board shall be held in the Board Room of the Exchange unless another place is fixed by the Board for any regular meeting or by the person or persons calling a special meeting and specified in the notice thereof.

Notice of a special meeting of the Board shall be given by the Secretary of the Exchange or by a person calling the meeting to each governor, other than any who have duly waived notice, (1) by written notice mailed, first class postage prepaid, not later than the second day before the meeting, or (2) by either written or oral notice given personally or by telephone or other means of electronic communication, in which case the meeting may be held as soon after such notice is given as a quorum shall be assembled at the place of the meeting, unless another time shall be specified in the notice. Any notice shall be sufficient if addressed to a governor at his office or at such other address as he shall have requested the Secretary of the Exchange to direct notices to him.

Except as otherwise specifically provided in the Constitution, a notice or waiver of notice need not specify the purpose of any meeting, and the Board may consider and take action upon any matter at its annual or any regular meeting or at any special meeting, whether or not such matter has been referred to in any notice or waiver of notice of such meeting.

Quorum

Except as otherwise specifically required by the Constitution with respect to the vote necessary for action to be taken by the Board, seven governors shall be sufficient to constitute a quorum for any meeting of the Board, and any action taken pursuant to the vote of a majority of the governors present at such meeting shall be deemed to be the action of the Board.

Contracts of Employment

The Board may authorize any officer, on behalf of the Exchange, to enter into a contract of employment with any person for such period of time and upon such other terms and conditions as may be set forth in a written agreement which has been submitted to and authorized by the Board.

Selection of Chairman

The Board shall, by the affirmative vote of a majority of the entire Board, elect the Chief Executive Officer of the Exchange, who shall be the Chairman of the Board, to serve for such period of time as the Board may determine, and the Board shall, by like vote, fix his compensation.

At its annual meeting the Board shall elect from among its members who are regular, associate or allied members of the Exchange, the Vice-Chairman of the Board to serve until the next annual meeting of the Board and until his successor has been elected and takes office.

Selection of general counsel

Subject to the approval of the Board by the affirmative vote of a majority of the governors then in office, the Chairman shall appoint independent general counsel for the Exchange, who shall consult with and advise the

Board and the officers of the Exchange with respect to legal matters pertaining to the Exchange, and the Chairman, subject to like approval of the Board, may terminate such appointment. The Board shall fix the compensation of such counsel.

Trial of members, member organizations and approved persons

Subject to the provisions of the Constitution, the Board may adopt, amend or repeal such rules and prescribe such procedures as it may deem necessary or appropriate for the conduct of disciplinary proceedings and reviews therefrom. The Board shall have the power to enforce any penalty that may be imposed upon a member, member organization, approved person or employee of a member or member organization pursuant to any such disciplinary proceeding.

Transactions in Exchange securities

The Board shall have the power to require that transactions, in which members participate, in securities admitted to dealings upon the Exchange shall be made or executed upon the Exchange.

Penalties

The Board may prescribe penalties to be imposed for violation of rules and policies adopted pursuant to the Constitution, and for neglect or refusal to comply with orders, directions or decisions of the Board or of any officer or employee of the Exchange or of any committee acting under powers delegated by the Board, and for other offenses against the Exchange where penalties are not specifically prescribed by the Constitution.**

Contracts

The Board shall prescribe rules for dealing on the Exchange. It may adopt such rules as it may deem necessary and proper in respect to contracts, including Exchange and Member Contracts, and the performance thereof, and as to default and insolvency. It may extend or postpone the time for the performance of Exchange Contracts whenever in its opinion such action is called for by the public interest or by just and equitable principles of trade.

Admission of securities

The Board shall establish standards and requirements with respect to the listing or admission to unlisted trading on the Exchange of securities, contracts in securities "when, as and if issued" or "when-distributed" and rights, warrants and similar privileges appertaining to securities, and with respect to the continued listing or admission to unlisted trading thereof or the suspension of trading therein or removal of the same from listing or unlisted trading. The Board may grant to the Chairman, or such officer or officers of the Exchange as he may designate, the authority to approve any such securities, contracts in securities, rights, warrants or privileges, for original listing or admission to unlisted trading upon the Exchange and to admit the same to dealings on an "issued", "when issued" or "when-distributed" basis; to list or admit to dealings on an "issued", "when issued" or "when-distributed" basis securities of an issuer having securities already listed or admitted to unlisted trading on the Exchange, including certificates of deposit, rights to subscribe, and other securities issued in exchange for or growing out of such securities; to suspend dealings in such securities at any time, and without notice, when such action is deemed appropriate and to remove the same from listing or from unlisted trading; to make such

certifications or file such notices with respect to the listing and registration of any such securities or the suspension of dealings or removal thereof from listing or unlisted trading as may be required by the Securities Exchange Act of 1934 and rules and regulations issued thereunder; and to take such other action as may be necessary or appropriate in connection with the listing, suspension of trading or removal from listing or unlisted trading of any such securities. Any company directly affected by a decision of the Chairman or such duly authorized officer of the Exchange with respect to the listing of its securities or the removal thereof from listing or unlisted trading, may appeal such decision to the Board. A committee designated by the Board shall conduct a hearing with respect to any such appeal and shall make recommendations to the Board with respect thereto. The decision of the Board with respect to any such appeal shall be final and conclusive, except that the Board under its general power of delegation may authorize the Executive Committee to consider any or all such appeals and in such case the decision of the Executive Committee with respect thereto shall be final and conclusive.

Corners

Whenever, in the opinion of the Board, a corner has been created in a security listed or admitted to unlisted trading on the Exchange, or a single interest or group has acquired such control of a security so listed or so admitted to unlisted trading that the same cannot be obtained for delivery on existing contracts except at prices or on terms arbitrarily dictated by such interest or group, the Board may postpone the time for deliveries on Exchange Contracts therein, and may, from time to time, further postpone such time or may postpone deliveries until further action by it, and may at any time by resolution declare that if such security is not delivered on any contract calling for delivery thereof at or before the time to which delivery has been postponed or which has been fixed by the Board for such delivery, such contract shall be settled by payment to the party entitled to receive such security, or by the credit to such party, of a fair settlement price, determined as hereinafter provided. If the parties to any contract which is to be settled on the basis of such fair settlement price do not agree with respect thereto, such fair settlement price and the date for the payment of the same may be fixed by the Board. The Board before fixing the same shall give the parties to the contract which is to be settled on the basis thereof an opportunity to be heard either before the Board or before a special committee appointed for the purpose. Such special committee shall report the testimony, together with its conclusions thereon, to the Board, which may act upon such report without further hearing, or, in its discretion, may accord the parties a further hearing before acting thereon.

Invitation to non-governors

The Board may invite a person, not a member thereof, to attend its meetings and to participate in its deliberations, but such person shall not have the right to vote.

Members, member firms, member corporations and approved persons

The Board shall have general supervision over members, member firms and member corporations, and shall have general supervision over approved persons in connection with their conduct of the business of member corporations. The board may examine into and regulate the conduct and financial condition of members, member firms, member corporations and approved persons. It shall have supervision over and may adopt such rules as it may deem necessary or proper with respect to the formation of member

firms and member corporations, the continuance thereof, the finances and capital requirements thereof, the types, terms, conditions and issuance of securities by member firms and member corporations and trading in such securities, the interest of members and other persons in member firms and member corporations, the partners, officers, directors, stockholders and employees of members, member firms and member corporations, the offices of members, member firms and member corporations, the business connections of members, member firms and member corporations, and their association with or domination by or over any corporations, firms or persons engaged in the securities business. The Board shall have supervision over all matters relating to the collection, dissemination and use of quotations and of reports of prices on the Exchange and may grant to the Chairman, or to such officer or officers of the Exchange as he may designate, the authority to approve or disapprove any application for ticker or quotation service to any non-member, or for telephonic or telegraphic wire, wireless or other connection between any office of any member or member firm or member corporation and the office of any corporation, firm or individual, whether or not a member of the Exchange, and to require at any time the discontinuance of any such service or connection. The Board may grant to the Chairman, or such officer or officers of the Exchange as he may designate, the authority to approve or disapprove of any connection or means of communication with the Floor and to require at any time the discontinuance of any such connection or means of communication. The Board shall establish standards and requirements for the registration of regular members as specialists or odd-lot dealers in securities dealt in on the Exchange, and may grant to a committee or committees, the authority to (i) approve the registration of regular members as specialists or odd-lot dealers, (ii) revoke or suspend any such registration at any time, (iii) allocate to a registered specialist or odd-lot dealer any security dealt in on the Exchange, and (iv) revoke any such allocation, temporarily or permanently, at any time.

Personal interest

No member of the Board shall participate in the determination of any matter brought before it in which such member has a personal interest; but, except as otherwise specifically provided in the Constitution, membership on a committee which has made prior inquiry or investigation of the subject under examination by the Board, with or without recommendation thereon, shall not constitute any such disqualification.

Interpretation

The Board shall be authorized and empowered to interpret the Constitution and rules of the Exchange and such interpretation shall be conclusive and binding.

Subsidiaries

The Board may cause to be organized any corporation which, in the opinion of the Board, is necessary to facilitate the business of members, member firms or member corporations or the performance of the functions of the Exchange. The Board may authorize the acquisition and holding of all or any part of the stock of such corporation and may authorize all acts and things necessary to enable such corporation to carry out the purposes of its organization.

Group hospitalization plan

The Board may authorize a group hospitalization plan on such terms and conditions as it may deem appropriate, and any member may elect to par-

ticipate therein by giving written notice to the Treasurer of the Exchange. The Board may adopt such rules with respect to such group hospitalization plan as it may deem appropriate and may modify or terminate such plan at any time. Any member who elects to participate in such group hospitalization plan shall pay to the Exchange, as a charge of the Exchange, any premiums or other amounts payable with respect to the member's participation in such plan. Any member participating in such group hospitalization plan may withdraw therefrom upon giving to the Treasurer of the Exchange written notice of the member's election to withdraw from such plan and upon paying to the Exchange all premiums and other amounts due or to become due from such member down to the date his withdrawal becomes effective under such plan. The Exchange shall not be liable for any damages sustained by any member or person insured under such plan from any cause whatsoever.

Exhibit D
American Stock Exchange
Delisting Policies
2 CCH American Stock
Exchange Guide ¶10,051

Delisting Policies

The Constitution of the American Stock Exchange provides that the Board of Governors may in its discretion at any time, and without notice, suspend dealings in or may remove any security from listing or from unlisted trading.

The Exchange does not rate or evaluate any security dealt in on the Exchange, but as a matter of policy the Exchange will consider the suspension of trading in, or removal from listing or unlisted trading of, any security when, in the opinion of the Exchange:

- (a) the financial condition and/or operating results of the issuer appear to be unsatisfactory and do not warrant continuation of the security on the list, or
- (b) it appears that the extent of public distribution or the aggregate market value of the security has become so reduced as to make further dealings therein on the Exchange inadvisable, or
- (c) the issuer has sold or otherwise disposed of its principal operating assets, or has ceased to be an operating company, or
- (d) the issuer has failed to comply with its listing agreements with the Exchange, or
- (e) any other event shall occur or any condition shall exist which makes further dealings on the Exchange in the security unwarranted.

Application of Policies

The determination as to whether a security warrants continued trading on the Exchange is not based on any precise mathematical formulae. Each case is considered on the basis of all the relevant facts and circumstances and in light of the objectives of the Exchange's policies regarding continued listing.

To assist in the application of these policies, the Exchange has adopted certain guidelines, outlined below, under which it will normally give consideration to suspending dealings in, or removing, a security from listing or unlisted trading. However, these guidelines in no way limit or restrict the Exchange in applying its policies regarding continued listing, and the Exchange may at any time, in view of the circumstances in each case, suspend dealings in, or remove, a security from listing or unlisted trading when in its opinion such security is unsuitable for continued trading on the Exchange. Such action will be taken regardless of whether the issuer meets or fails to meet any or all of the conditions discussed below.

1. Financial Condition and/or Operating Results:

In applying this policy the Exchange will normally give consideration to suspending dealings in, or removing from the list, securities of a company (i) which has net tangible assets of less than \$1,000,000 if such company has sustained net losses in each of its two most recent fiscal years, or (ii) which has net tangible assets of less than \$3,000,000 if such company has sustained net losses in three of its four most recent years.

In the event a company sustains losses which are so substantial in relation to its overall operations or its existing financial resources, or its financial condition becomes so impaired, that it appears questionable, in the opinion of the Exchange, as to whether such company will be able to continue operations and/or meet its obligations as they mature, the Exchange may give immediate consideration to suspending dealings in, or removing from the list, the securities of such company.

2. Limited Distribution—Reduced Market Value:

In applying this policy the Exchange will normally give consideration to suspending dealings in, or removing from the list, a security when any one or more of the following conditions exist:

In the case of Common Stock:

- (a) if the number of shares publicly held (exclusive of holdings of officers, directors, controlling shareholders or other family or concentrated holdings) is less than 150,000, or
- (b) if the total number of shareholders of record is less than 450 or if the number of shareholders of 100 shares or more is less than 300, or
- (c) if the aggregate market value of shares publicly held (exclusive of management and concentrated holdings) is less than \$750,000.

In the case of Preferred Stock and similar issues:

- (a) if the number of shares publicly held (exclusive of management and concentrated holdings) is less than 50,000, or
- (b) if the aggregate market value of shares publicly held (exclusive of management and concentrated holdings) is less than \$1,000,000.

In the case of Bonds:

- if the aggregate market value or the principal amount of bonds publicly held (exclusive of management and concentrated holdings) is less than \$400,000.

3. Disposal of Assets—Reduction of Operations:

In applying this policy the Exchange will normally give consideration to suspending dealings in, or removing from the list, securities of a company whenever any of the following events shall occur:

(a) If the company has sold or otherwise disposed of its principal operating assets or has ceased to be an operating company or has discontinued a substantial portion of its operations or business for any reason whatsoever, including, without limitation, such events as sale, lease, spin-off, distribution, foreclosure, discontinuance, abandonment, destruction, condemnation, seizure or expropriation. Where the company has substantially discontinued the business that it conducted at the time it was listed or admitted to trading, and has become engaged in ventures or promotions which have not developed to a commercial stage or the success of which is problematical, it shall not be considered an operating company for the purposes of continued trading and listing on the Exchange.

(b) If liquidation of the company has been authorized. Where such liquidation has been authorized by stockholders and the company is committed to proceed, the Exchange will normally continue trading until substantial liquidating distributions have been made.

(c) If advice has been received, deemed by the Exchange to be authoritative, that the security is without value. In this connection, it should be noted that the Exchange does not pass judgment upon the value of any security.

4. Failure to Comply with Listing Agreements:

Securities of a company which fails, or the transfer agent or registrar of which fails, to comply with its listing or other agreements with the Exchange in any mate-

trial respect (e.g., failure to distribute annual report when due, failure to report interim earnings, failure to observe Exchange policies regarding timely disclosure of important corporate developments, failure to solicit proxies, issuance of additional shares of a listed class without prior listing thereof, failure to obtain shareholder approval or corporate action where required by Exchange policies, etc.), are subject to suspension from dealings and, unless prompt corrective action is taken, removal from listing.

5. Other Events:

The exchange will give consideration to suspending dealings in, or removing from the list, a security when any one of the following events shall occur:

(a) *Registration No Longer Effective.* If the registration or exemption from registration thereof pursuant to the Securities Exchange Act of 1934 is for any reason no longer effective.

(b) *Payment, Redemption or Retirement of Entire Class, Issue or Series.* If the entire outstanding amount of a class, issue or series is retired through payment at maturity or through redemption, reclassification or otherwise. In such event, the Exchange may, at a time which is appropriate under all the circumstances of the particular case, suspend dealings in the security and, in the case of a listed security, give notice to the Commission, on the Commission's Form 25, of intention to remove such security from listing and registration as required by Rule 12d2-2 under the Securities Exchange Act of 1934.

(c) *Operations Contrary to Public Interest.* If the company or its management shall engage in operations which, in the opinion of the Exchange, are contrary to the public interest.

(d) *Failure to Pay Listing Fees.* If the company shall fail or refuse to pay when due any applicable listing fees established by the Exchange.

(e) *Low Selling Price Issues.* In the case of a common stock selling for a substantial period of time at a low price per share (generally below \$5 per share), if the issuer shall fail to effect a reverse split of such shares within a reasonable time after being notified that the Exchange deems such action to be appropriate under all the circumstances. In this connection, the Exchange will give due consideration to all pertinent factors, including market conditions in general, the number of shares outstanding, plans which may have been formulated by management, applicable regulations of the state or country of incorporation or of any governmental agency having jurisdiction over the company, the relationship to other Exchange policies regarding continued listing, etc.

Effective Date

The foregoing policies shall apply in all respects to each company with securities listed or admitted to unlisted trading privileges on the Exchange on the date that its annual report for its first fiscal year ending on or after December 31, 1967, is furnished to shareholders, but in no event later than four months after the end of such fiscal year. However, with respect to:

(a) a company which has heretofore been considered as a "cash flow" or holding company under the policies of the Exchange relating to continued listing as amended in December 1964, and

(b) a company originally listed as an exploration or development company,

that portion of the guideline relating to financial condition and/or operating results providing for review and consideration of delisting of a company which has net tangible assets of less than \$1,000,000 if it has sustained net losses in each of its two most recent fiscal years or net tangible assets of less than \$3,000,000 if it has sustained net losses in three of its four most recent fiscal years, shall not be applicable until the date that its annual report for its fiscal year ending on or after December 31, 1969, is furnished to stockholders, but in no event later than four months after the end of such fiscal year.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

74-1795
Index No. 73-Civ. 3689

GEORGE J. SCHONHOLTZ,

Plaintiff

against

AMERICAN STOCK EXCHANGE, INC., et al.,

Defendant

AFFIDAVIT OF SERVICE
BY MAIL

STATE OF NEW YORK, COUNTY OF NEW YORK

ss.:

The undersigned being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age and resides at
24-84 Fir Ct., E. Meadow, N.Y. 11554

That on September 11, 1974 deponent served the annexed two copies of
Brief on Silverman & Haines and Winthrop, Stimson Putnam & Roberts
attorney(s) for plaintiff in this action at 75 Rockefeller Plaza, N.Y. and 40 Wall St., N.Y., respectively
the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed
in a postpaid properly addressed wrapper, in ~~an~~ ^{an} official depository under the exclusive care
and custody of the United States Postal Service within the State of New York.

Sworn to before me

Sept 11, 1974
Jacob I. Friedman

JACOB I. FRIEDMAN
NOTARY PUBLIC, State of New York
No. 24-6413550
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1976

[Handwritten signature of Roy G. Nelson]
The name signed must be printed beneath
ROY G. NELSON



Index No.

against

Plaintiff

Defendant

**ATTORNEY'S
AFFIRMATION OF SERVICE
BY MAIL**

STATE OF NEW YORK, COUNTY OF

ss.:

*The undersigned, attorney at law of the State of New York affirms: that deponent is
attorney(s) of record for*

That on

19

deponent served the annexed

on

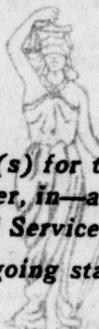
attorney(s) for

in this action at

*the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed
in a postpaid properly addressed wrapper, in—a post office—official depository under the exclusive care
and custody of the United States Postal Service within the State of New York.*

The undersigned affirms the foregoing statement to be true under the penalties of perjury.

Dated



The name signed must be printed beneath

Attorney at Law

